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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KEVIN EMBRY, an individual, on behalf of himself,
the general public and those similarly situated

Plaintiff,

v.

ACER AMERICA CORPORATION; AND DOES 1
THROUGH 50

Defendants

Case No. CV-09-1808 (JW)

**PLAINTIFF'S MOTION FOR
LEAVE TO SEEK
RECONSIDERATION RE ORDER
GRANTING IN PART
PLAINTIFF'S MOTION TO
REQUIRE APPELLATE BOND**

Date: _____, 2012

Time: 9:00 am

Place: Courtroom 9, 19th Floor

Judge: Hon. James Ware

MOTION FOR LEAVE TO SEEK RECONSIDERATION

Plaintiff respectfully moves, pursuant to Local Rule 7-9, for leave to seek reconsideration of the Court's Order of June 5, 2012, granting, in part, Plaintiff's motion for appellate bond (Dkt.# 253). Plaintiff specifically moves the Court to extend the Order to include, and apply to, Objector Christopher Bandas and his counsel of record, the Law Offices of Darrell Palmer. This motion is based on the following Memorandum of Points and Authorities, the complete file and record in this action, and all other matters of which the Court may take notice.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion relates to a single issue. This Court's Order of June 5, 2012 (N.D. Cal. Dkt.# 253) ("the Order") ordered Objector Cannata to either: (1) post a bond of \$70,650 within 14 days of the publication of this Order, or (2) file a notice of dismissal of his appeal. The Order further stated that it was not applied to Objector Christopher Bandas because, at that time, his appeal was not active; rather, it has been dismissed for failure to prosecute. (N.D. Cal. Dkt.# 253.)

On June 25, 2012, the Ninth Circuit granted Bandas' order to reinstate his appeal. (9th Cir. Appeal No. 12-15555 Dkt.# 10.) As it is now active, Plaintiff requests leave to move for reconsideration to request that the Order be applied, jointly and several, to Bandas and his attorney of record.

II. ARGUMENT

Objector Bandas filed his appeal on March 12, 2012. (N.D. Cal. Dkt.# 222.) His appeal was assigned appeal number 12-15555. (9th Cir. Appeal No. 12-15555 Dkt.# 1; N.D. Cal. Dkt.# 223.) He did not pay fees at time of filing. (N.D. Cal. Dkt.# 222 (stating "Appeal fee FEE NOT PAID.")) The Ninth Circuit issued an Order on March 22 directing him to pay the fee within 21 days or show cause why the appeal should not be dismissed. (9th Cir. Appeal No. 12-15555 Dkt.# 2; N.D. Cal. Dkt.# 229.) He did not pay or respond. On April 18 (27 days later), the Ninth Circuit dismissed the appeal. (9th Cir. Appeal No. 12-15555 Dkt.# 5; N.D. Cal. Dkt.# 233). Mr. Bandas then moved to reinstate the appeal. (9th Cir. Appeal No. 12-15555 Dkt.# 6; N.D. Cal. Dkt.# 243.) The Ninth Circuit denied the motion without prejudice to renewal after he provided proof that he had paid the fee. (9th Cir. Appeal No. 12-15555 Dkt.# 8; N.D. Cal. Dkt.# 248.) Mr. Bandas then paid the fee and renewed the motion to reinstate. (9th Cir. Appeal No. 12-15555 Dkt.# 9, 10; N.D. Cal. Dkt.# 249.) On June 25, 2012, the Ninth Circuit granted Bandas' motion to reinstate. (9th Cir. Appeal No. 12-15555 Dkt.# 10.)

Plaintiff had previously filed two motions related to Objectors Christopher Bandas and Sam Cannata: (1) for leave to take discovery (N.D. Cal. Dkt.# 228) and (2) for imposition of an

1 appellate bond, joint and severally, against Cannata, Bandas and the Law Offices of Darrell
2 Palmer (N.D. Cal. Dkt.# 232).

3 On April 24, the Court issued an order denying the motions as moot as they concerned
4 Bandas and the Law Offices of Darrell Palmer, on the grounds that the appeal had been
5 dismissed. (N.D. Cal. Dkt.# 245.) As the motions were not moot as to objector Sam Cannata,
6 whose appeal remained pending, Plaintiff immediately notified the Court, and the parties, of his
7 intent to appear and argue at the scheduled hearing. (N.D. Cal. Dkt.# 246.) The Court then
8 issued an order asking for additional briefing as to the status of the appeals and stated that it
9 would reconsider its denial of the motions if any appeal remains active. (N.D. Cal. Dkt.# 247.)
10 The parties submitted additional briefing. (N.D. Cal. Dkt.# 250-252.)

11 This Court considered the additional briefing, and, on June 5, ordered Objector Cannata
12 (1) post a bond of \$70,650 within 14 days of the publication of the Order, or (2) file a notice of
13 dismissal of his appeal.¹ The Order further stated that the Court only considered the bond request
14 as to Objector Cannata because Objector Bandas had represented to the Court that his appeal had
15 been dismissed. The Court stated, however, that “in the event that the Bandas appeal again
16 becomes active,” Plaintiff may renew his bond request as to Objector Bandas. (N.D. Cal. Dkt.#
17 253.)

18 Local rule 7-9(b)(3) permits a party to seek leave for reconsideration of any interlocutory
19 order if there is an “emergence of new material facts or a change of law occurring after the time
20 of such order.” See N.D. Cal. L.R. 7-9. As the Bandas appeal was reinstated after the Order was
21 entered, it constitutes a new material fact.

22 Furthermore, in the Order, the Court found that the merits of Cannata’s “appeal weigh
23 heavily in favor of requiring a bond, insofar as his objections to the settlement are lacking in
24 merit.” Plaintiff similarly argued that Bandas’ objections lacked merit. (N.D. Cal. Dkt.# 232.)
25 Subsequent to the filing of Plaintiff’s motion, the Ninth Circuit, in *Stern v. Gambello*, 2012 U.S.
26 App. LEXIS 9955 (9th Cir. May 17, 2012), rejected the same objections presented by the same
27 attorney—i.e., Darrell Palmer. One week later, in *Hartless v. Clorox Co.*, 2012 U.S. App. LEXIS

28 _____
¹ Cannata did not post a bond. Rather, he dismissed his appeal on June 15, 2012.

1 10539 (9th Cir. May 24, 2012), the Ninth Circuit again rejected the same objections—this time
2 made by both Christopher Bandas and Darrell Palmer.

3 On that basis, and for each of the reasons set forth in Plaintiff's motion (N.D. Cal. Dkt.#
4 232), Plaintiff requests that the Order be extended, and applied, to Objector Bandas and his
5 counsel of record, the Law Offices of Darrell Palmer.

6 DATE: June 26, 2012

7 GUTRIDE SAFIER LLP

8 /s/ Seth A. Safier
9 Adam Gutride
Seth A. Safier

PROOF OF SERVICE

I, Seth A. Safier, declare:

My business address is 835 Douglass, San Francisco, California. I am employed in the County of San Francisco, where this mailing occurs. I am over the age of 18 years and not a party to the within cause.

On June 26, 2012, I served the following documents:

PLAINTIFF'S MOTION FOR LEAVE TO SEEK RECONSIDERATION RE ORDER GRANTING IN PART PLAINTIFF'S MOTION TO REQUIRE APPELLATE BOND

on the following person(s) in this action by placing a true copy thereof as follows:

Jeff McFarland (jeffmcfarland@quinnemanuel.com)
Stan Karas (skaras@quinnemanuel.com)
Quinn Emanuel Urquhart & Sullivan, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017

Joseph Darrell Palmer
Law Offices of Darrell Palmer
603 North Highway 101, Ste. A
Solana Beach, CA 92075

☒ BY EMAIL DELIVERY. I caused said documents to be delivered by ECF to the above-mentioned persons.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this document was executed on June 26, 2012, at San Francisco, California.

/s/ Seth A. Safier